

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1986

STATE OF ILLINOIS, - - - - - Plaintiff,

*versus*

COMMONWEALTH OF KENTUCKY, - - - Defendant.

**EXCEPTIONS OF THE  
COMMONWEALTH OF KENTUCKY  
TO THE REPORT OF THE SPECIAL  
MASTER FILED OCTOBER 1, 1990**

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**No. 106, Original**  
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**October Term, 1986**

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**STATE OF ILLINOIS, - - - - - Plaintiff,**

**v.**

**COMMONWEALTH OF KENTUCKY, - - - Defendant.**

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**EXCEPTIONS OF THE**  
**COMMONWEALTH OF KENTUCKY**  
**TO THE REPORT OF THE SPECIAL**  
**MASTER FILED OCTOBER 1, 1990**  

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Pursuant to the Court's order, the Commonwealth of Kentucky ("Kentucky") excepts to the Report of the Special Master filed October 1, 1990, as follows:

1. Kentucky excepts to the conclusion that prior decisions of this Court control this case, and that the boundary between the State of Illinois and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and not the low-water mark on the northerly side as it exists from time to time.

2. Kentucky excepts to the conclusion that, based upon all the evidence presented, Kentucky has failed to carry its burden of proof to demonstrate, by a preponderance of the evidence, that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time, and that Illinois has acquiesced therein.

3. Kentucky excepts to the conclusion that the doctrine of laches is inapplicable in a boundary dispute between two states.

4. Kentucky excepts to the conclusion that the principles of erosion, accretion and avulsion are totally inapplicable to Kentucky's Ohio River boundary.

5. Kentucky excepts to the conclusion that the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and as a result, the present low-water mark on the Illinois side of the river is farther north than it was in 1792.

6. Kentucky specifically excepts to Recommendations 1, 2, 3, and 4.

Respectfully submitted,

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No. 106, Original  
IN THE  
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STATE OF ILLINOIS, - - - - - Plaintiff,

v.

COMMONWEALTH OF KENTUCKY, - - - Defendant.

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**BRIEF OF THE COMMONWEALTH OF KENTUCKY  
IN SUPPORT OF EXCEPTIONS TO THE  
REPORT OF THE SPECIAL MASTER  
FILED OCTOBER 1, 1990**

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**QUESTIONS PRESENTED**

I. Are prior decisions of this Court establishing the boundary between the Commonwealth of Kentucky and the states of Indiana and Ohio, to be the low-water mark on the northerly side of the Ohio River as it existed in the year 1792, controlling precedents on the question of Kentucky's boundary with Illinois?

II. Does the record support Kentucky's affirmative defenses of acquiescence, laches, accretion, erosion and avulsion to sustain Kentucky's claim that its Ohio River boundary with Illinois is the low-water mark on the Illinois side of the river, as it exists from time to time rather than the 1792 low-water mark?

III. Has the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and as a result, the present low-water mark on the Illinois side of the river is farther north than it was in 1792?

## STATEMENT OF THE CASE

On July 24, 1986, the State of Illinois sought leave to file an original complaint against the Commonwealth of Kentucky. Illinois alleged, *inter alia* that:

### XV.

The Commonwealth of Kentucky, through the acts and statements of its officials, claims that Kentucky's boundary with Illinois is along the present low-water mark on the northerly shore of the Ohio River, rather than the 1792 low-water mark.

### XVI.

By claiming the present low-water mark as its boundary with Illinois, Kentucky seeks to exercise sovereignty over territory to the north of the 1792 low-water mark, which territory Illinois asserts is within its boundaries.

### XVII.

The assertion of jurisdiction by the Commonwealth of Kentucky over territory north of the 1792 low-water mark is a direct infringement upon the sovereignty of the State of Illinois.

By its prayer for relief in its proposed bill of complaint, Illinois asked this Court to enter an order and decree:

1. Declaring the boundary line between the State of Illinois and the Commonwealth of Kentucky to be the low-water mark on the northerly shore of the Ohio River as it existed in 1792;
2. Perpetually enjoining the Defendant from disturbing in any manner the State of Illinois or its citizens from the peaceful use, and enjoyment of all land, water and jurisdiction within the boundaries of Illinois as established by the Court.



On October 14, 1986 (107 S. Ct. 265) the Court granted Illinois' motion to file an original complaint and on December 15, 1986, Kentucky filed an answer denying that 'the northern boundary of the Commonwealth of Kentucky, as established from the cession of Virginia, the Virginia-Kentucky Compact and decisions of this Court, is the low-water mark on the northerly shore of the Ohio River as it existed in 1792' and raised certain affirmative defenses that the equitable principles of acquiescence and laches operate to place its boundary with Illinois not at the low-water mark as it exists from time to time.

Kentucky also raises by affirmative defense the principles of riparian boundaries, including accretion, erosion and avulsion to apply to its boundary with Illinois, as the low-water mark on the northwestern side of the Ohio River as it exists from time to time.

On March 2, 1987, the Court appointed the Honorable Robert Van Pelt, Senior Judge of the United States District Court for the District of Nebraska as Special Master in this case.

By order, dated June 27, 1988, the Court appointed the undersigned, Matthew J. Jasen, to succeed Judge Van Pelt, who died April 27, 1988.

On October 1, 1990, the Special Master filed his Report with this Court. In the Report, the Special Master concluded that Kentucky had not proven its affirmative defenses by a preponderance of the evidence and made recommendations to this Court.

## **HISTORICAL BACKGROUND**

The Commonwealth of Kentucky was carved out of what was the original Commonwealth of Virginia. At the time of the Revolutionary War, Virginia owned or claimed all of the land which comprises Kentucky as well as the land northwest of the Ohio River, including what is now Illinois. In 1784 Virginia executed a deed of cession, known as the Virginia cession, which ceded to the United States all of its lands northwest of the Ohio



River. 1 The Laws of the U.S., 472 (1784). It is agreed that Virginia retained all of the Ohio River through its northerly low-water mark as well as all of what now is Kentucky. On December 18, 1789, the General Assembly of Virginia voted to transform the then District of Kentucky into an independent state. 1 Laws of the U.S., 673 (1789). Congress thereupon admitted Kentucky to the Union on June 1, 1792, by an act adopted February 4, 1791. 1 Stat. (U.S.) 189 (1791). That act set the boundaries of Kentucky as they existed on December 18, 1789. Thus, the boundary was the low-water mark on the northerly side of the Ohio River.

Pursuant to the Illinois Enabling Act, enacted by Congress on April 18, 1818, the State of Illinois was formed from part of the territory ceded by Virginia. According to the terms of the Illinois Enabling Act, Illinois' boundary with Kentucky was to run along the "north-western shore" of the Ohio River. 3 Stat. (U.S.) 428 (1818).

### SUMMARY OF ARGUMENT

The Report erroneously concludes that prior decisions of this Court, principally *Ohio v. Kentucky*, 444 U.S. 335 (1980), which determined that Kentucky's boundary with Ohio and Indiana is the 1792 northerly low-water mark, is controlling precedent on the question of Kentucky's boundary with Illinois.

If this case were before the Court, simply *as a matter of law*, *Ohio v. Kentucky* would be controlling precedent.

However, this case is before the Court on the *factual issue* of acquiescence which Kentucky has raised as an affirmative defense to Illinois' claim that its boundary is the 1792 low-water mark.

None of the prior decisions cited by the Special Master, including *Ohio v. Kentucky* (1980), considered acquiescence in determining the boundary line *along the entire length* of any state bordering with Kentucky on the Ohio River.

*Ohio v. Kentucky* (1980), held that Kentucky boundary with Ohio was the northerly 1792 low-water mark, as a matter of law. The factual issue of acquiescence was not considered.

*Indiana v. Kentucky*, did consider the issue of acquiescence, but only as it pertained to which state owned Green River Island. The location of the *entire* 350 mile *boundary* between the two states was not in issue.

*Handly's Lessee v. Anthony* construed Virginia's Cession of 1784 and definitively determined that Kentucky's boundary with Indiana was the northerly low-water mark. The Court in *Handly* stated:

. . . The states, then, are to have the river itself, wherever that may be, for their boundary.

Kentucky submits that *Handly* is the basis for Kentucky's historical exercise of dominion and jurisdiction over the entire river to the current low-water mark on the Illinois shoreline and Illinois' historical acquiescence to that right and authority.

The Report erred in concluding Kentucky failed to prove its affirmative defense of acquiescence.

Acquiescence requires two things:

1. The exercise by one state of dominion and jurisdiction over the territory, and

2. The long acquiescence by the other state in this exercise of dominion, particularly when coupled with a long delay by the acquiescing state in bringing an action to oppose that claim of title.

Kentucky has always exercised sovereignty and jurisdiction over the Ohio River to the current northerly low-water mark on the Illinois shore.

An 1810 Kentucky statute set the boundary of each Ohio River county bordering the river at the north side of the river. Since then, Kentucky's highest Court has always recognized Kentucky's sovereignty over the river to the northerly low-water mark or shore.

Kentucky's law enforcement officials enforce Kentucky's boating, fishing and hunting laws up to the Illinois shoreline. Illinois in its Brief In Support of its Complaint cites this assertion of jurisdiction by Kentucky to the Illinois shoreline as a basis for its Complaint.

Coroners from both states testified that if a body is in the water, Kentucky would exercise jurisdiction; if it is on the Illinois shore, Illinois took the body.

Kentucky has also asserted jurisdiction through taxation of barges and structures on the river, granting of mineral leases, and requiring Illinois residents fishing in the Ohio River to have a special Ohio River sport fishing license or commercial fishing license.

Illinois, since 1818, has acquiesced to Kentucky's possession and dominion over the river and waited *168 years* to bring any proceeding to this Court to claim either that the boundary is the 1792 low-water mark or to enjoin Kentucky's exercise of jurisdiction to its shoreline. The Report fails to consider this single most important and *uncontroverted fact* in the case. Moreover, Illinois performs no law enforcement functions on the river south of its shoreline, i.e., fishing, hunting or boating.

*Inaction alone* may constitute acquiescence when it continues for a sufficiently long period. *Georgia v. South Carolina*. One hundred sixty-eight years is sufficiently long.

Illinois has also acquiesced to Kentucky's exercise of jurisdiction to its shoreline through actions of its public officials, bridge agreements and its Constitutions of 1818, 1848 and 1870.

The mutual understanding by both states is that the current low-water mark or shoreline serves, in day-to-day practice, as the boundary. This reflects the *status quo* and a practical location of a common boundary. Acquiescence may be used to confirm the *status quo*.

Finally, the Report's discussion on whether the Dams have permanently raised the level of the river is *premature* as the issue is not before the Court. This issue will have to be factually determined, if need be, at a later date on the basis of the law found to be applicable to the case.

## ARGUMENT

### I.

**PRIOR DECISIONS OF THIS COURT ESTABLISHING THE BOUNDARY BETWEEN THE COMMONWEALTH OF KENTUCKY AND THE STATES OF INDIANA AND OHIO ARE NOT CONTROLLING PRECEDENTS ON THE QUESTION OF KENTUCKY'S BOUNDARY WITH ILLINOIS?**

#### A.

**This Court Has Never Considered, In Any Prior Decision, The Factual Issue Of Acquiescence In Determining The Location Of The Boundary Line Along The Entire Length Of Any State Bordering With Kentucky On The Ohio River.**

The Special Master's Report erroneously concludes that prior decisions of this Court which established the boundary between Kentucky and the States of Ohio and Indiana are controlling precedents on the question of Kentucky's boundary with Illinois. In support of this conclusion, the Report cites *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820); *Indiana v. Kentucky*, 136 U.S. 479 (1890); *Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592 (1899); and *Ohio v. Kentucky*, 444 U.S. 335 (1980).

#### (1) *OHIO V. KENTUCKY* (1980)

Kentucky concedes that if this case were before the Court simply as a *matter of law*, *Ohio v. Kentucky*, 444 U.S. 335 (1980) would be controlling precedent. However, such is not the case.

This boundary case is before the Court on the factual issue

of acquiescence which Kentucky has raised as an affirmative defense on the question of its boundary with Illinois. An issue which was not before the Court in *Ohio v. Kentucky* (1980).

The present case differs from these prior decisions cited by the Report in that *none* of them dealt with or considered the factual issue of acquiescence as it pertained to the location of the boundary line *along the entire length* of any State bordering with Kentucky on the Ohio River.

## (2) *INDIANA V. KENTUCKY*

*Indiana v. Kentucky*, 136 U.S. 479 (1890) did consider the issue of acquiescence, but only as it pertained to establishing the ownership of an island. The dispute in that case was not over, nor did it involve, the location of the entire boundary line between Kentucky and Indiana along the Ohio River (a distance of approximately 350 miles). The dispute was over which State owned Green River Island, a tract of land nearly five miles in length and over half a mile in width, embracing about 2,000 acres. The Court held that Kentucky owned the island and resulted in the location *and marking with monuments* of less than 5 miles of the land boundary line separating Kentucky from the mainland of Indiana along the filled channel. *Indiana v. Kentucky*, 167 U.S. 270 (1897), (Report of Commissioners permanently marking 1896 survey line approved by the Court).

Because a proper understanding of what *Indiana v. Kentucky* did and did not do is critical to its case, Kentucky submits that an extensive discussion of that case is necessary here.

Green River Island at one time had been a true island separated from the Indiana mainland by a channel of the Ohio River. The river gradually changed its course so that the channel north of the island filled up and the island became and was attached to the Indiana mainland when Indiana became a State in 1816 and at the time of the litigation in 1890.

In deciding which State owned the island, the Court applied

two principles of law.

The first principle, *a legal one*, was that if an island is within a State's jurisdiction when it becomes a State, no subsequent change in the river can divest it of its ownership of that island. The Court cited *Missouri v. Kentucky*, 78 U.S. 395 (1871) in which this principle was applied to resolve a dispute between Missouri and Kentucky over the ownership of Wolf Island in the Mississippi River. 136 U.S. at 508.

The second principle, *a factual one*, was the doctrine of acquiescence. That is, the long acquiescence by one State in the exercise by another State of dominion and jurisdiction over the territory, particularly when coupled with a long delay or lapse of time in which the acquiescing State fails to oppose that claim of title or bring any judicial proceeding to challenge the possession of the territory, is conclusive of the possessing State's title and rightful authority. 136 U.S. at 510.

In framing the determinative issue in the case, the Court stated:

The question then becomes one of fact, did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a State and her boundaries were established?

136 U.S. at 509.

Addressing this question, the Court reviewed the evidence of both States which consisted of speculations of geologists, recollections of witnesses and a great number of transactions introduced by Kentucky which proceeded on the assumption that the tract was within the jurisdiction of Kentucky, such as an 1810 Kentucky statute declaring her sovereignty over the Ohio River; two adjudications, one by the United States Circuit Court and one by a Circuit Court of Kentucky that the island was within the jurisdiction of Kentucky; and that between 1818 and 1877 numerous grants of parcels of land on the island were made by



Kentucky and taxes assessed.

The Court concluded from the evidence that when Kentucky became a State the island was separated from the mainland of Indiana by a channel of the Ohio River.

The Court then applied the doctrine of acquiescence and concluded that Indiana's long acquiescence to Kentucky's exercise of jurisdiction over the island coupled with the fact that Indiana had waited over seventy years after becoming a State before asserting a claim to the island was conclusive of Kentucky's right to the island.

In applying this doctrine, the Court stated:

But above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. *It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land.*

\* \* \* \*

*This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.*

136 U.S. at 509, 510. [Emphasis added.]

Thus, the Court resolved the dispute over the ownership of Green River Island in favor of Kentucky. As a result, the Court appointed three commissioners to ascertain and run the boundary line between the States north of the tract known as Green River Island. 136 U.S. 518, 519; *Indiana v. Kentucky*, 159 U.S. 275 (1895), (appointment of commissioners); *Indiana v. Kentucky*, 163 U.S. 520 (1896), (Report of Commissioners); *Indiana v. Kentucky*, 167 U.S. 270 (1897), (Report of Commissioners permanently marking 1896 survey line approved by the court).

Kentucky filed an exception with the Commissioners on their Report which marked the line established by *Indiana v. Kentucky*, (163 U.S. at 528). The exception requested that the line established by the Commissioners be extended "*until it intersects the present low water line of the Ohio River both at the upper and lower ends. In other words that you run at each end to the points where low water mark in 1792 coincides with low water mark at the present time.*" 163 U.S. at 528. [Emphasis added.]

The commissioners decided they were not authorized to lay



any line beyond the upper and lower limits of Green River Island as it existed in 1792. 163 U.S. at 524.

The Court ordered that the exception to the Report of the commissioners be overruled and the surveyed boundary line, as described and delineated in the Report, be permanently marked as recommended in the Report. 163 U.S. at 536, 537.

The Court then further ordered:

And it is further ordered, adjudged, and decreed that this decree is without prejudice to further proceedings as either of the parties may be advised for the determination of such part of the boundary line between the States as may not have been settled by this decree under the pleadings in this case.

163 U.S. at 537. Kentucky submits this supports its argument that *Indiana v. Kentucky* decided only the location of Kentucky's land boundary north of Green River Island. Accordingly, only the land boundary in the filled channel was marked with stone monuments and iron posts.

The importance of the location of the 1792 low-water mark was to determine if the tract of land (Green River Island) was a true island in the Ohio River when Kentucky was admitted to the Union.

Moreover, the 1943 interstate compact between Indiana and Kentucky is further evidence that *Indiana v. Kentucky* did not decide the entire boundary line between the states.

### (3) 1943 INDIANA-KENTUCKY COMPACT

In March, 1942, the General Assembly of Kentucky adopted an act to establish the boundary line between the State of Indiana and the Commonwealth of Kentucky by agreement, 1942 Ky. Acts, Chapter 116. (Filing No. 12(b), Kentucky Legislative Research Commission, Informational Bulletin No. 81, pp. 25, 26.) The act recited that neither of the terminal points of the boundary line

described in the Green River Island case, *Indiana v. Kentucky*, 163 U.S. 520 (1896), "reached the *low water mark of the right side of the Ohio River, forming the remainder of the boundary line between said States,* " that the Governors of the two states "have appointed Commissioners to study said question for the purpose of ascertaining the true and legal boundary line thus in dispute," and that "said Commissioners have agreed upon the true and legal boundary line." [Emphasis added.] The act then provided that upon "enactment of a similar and reciprocal law by the State of Indiana and the approval and consent of the Congress of the United States of America to the compact thereby effected, the boundary line between the State of Indiana and the Commonwealth of Kentucky shall be as follows". The act then described the two lines necessary to connect the two terminal points to the "low water mark" and completed the description of the Indiana-Kentucky boundary upstream with the language "*to the low water mark on the right side of the Ohio River and thence upstream* at low water mark on the right side of said River, " and completed the description of the Indiana-Kentucky boundary downstream with the language "*to the low water mark on the right side of the Ohio River and thence downstream* with said low water mark on the right side of said River." The Indiana General Assembly passed a like act. 1943 Ind. Acts, Ch. 2. The Congress of the United States then passed a joint resolution in 1943 reciting the actions of the Governors and commissioners and the passage of the Kentucky Act in 1942 and the Indiana Act in 1943, and approved the boundary line as described in the acts. 57 Stat. 248 (1943). (Filing No. 12(b), Kentucky Legislative Research Commission, Informational Bulletin No. 81, pp. 26, 27.)

No reference to any time or specific location concerning the low water mark upstream or the low water mark downstream was made in these legislative acts of the States or joint resolution of Congress.

For these reasons, Kentucky submits *Indiana v. Kentucky* did

not decide the *entire boundary* between the two states and is not controlling precedent here.

(4) *HENDERSON BRIDGE CO. V. CITY OF HENDERSON*

*Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592 (1899), involved the constitutionality of the city's authority to tax a bridge over the Ohio River. The exact location of the northern low water mark was not at issue. Thus, *Henderson Bridge v. City of Henderson* is not a controlling precedent on the question of Kentucky's boundary with Illinois.

B.

*Handly's Lessee V. Anthony*, 18 U.S. (5 Wheat) 174 (1820), formed the basis of Kentucky's long factual exercise of dominion and jurisdiction over the entire Ohio River to the current low-water mark.

In construing Virginia's Cession of 1784, the Handly Court stated:

In pursuing this inquiry, we must recollect that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying, and being, to the north-west of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent states. *These states, then, are to have the river itself, wherever that may be for their boundary.* This is a *natural boundary*, and in establishing it, Virginia must have had in view the *convenience of the future population of the country.*

*Id.* at 379.

\* \* \* \*

... Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with

insurmountable difficulty in attempting to draw any other line than *the low-water mark*.

*Id.* at 380, 381. [Emphasis added.]

Thus, this Court, in 1820, ruled that Kentucky's northerly boundary extends to the low-water mark on the northern side of the Ohio River.

If there had been doubts as to the extent of Kentucky's jurisdiction on the Ohio River, such were removed by *Handly*. Kentucky submits that since *Handly* it has openly and continuously asserted jurisdiction over the entire river to the northern low-water mark on Illinois' shoreline ever since.

This explains why, in all subsequent cases concerning the boundary of Kentucky on the Ohio River, the courts always harken to *Handly*.

For this reason, *Handly* is the basis for Kentucky's *historical exercise* of dominion and jurisdiction over the river and Illinois' *historical acquiescence* to that right and authority.

Kentucky submits that when Virginia retained the Ohio River as the northerly boundary of the District of Kentucky, she recognized that the river, being a great natural phenomenon, would change its character and bounds from time to time. Based upon this recognition, it is clear that Virginia intended this boundary to be a natural moving and continuing line situated, for public convenience and avoidance of controversy, at the current low-water mark on the northern shore, wherever that might be.

## II.

**THE RECORD SUPPORTS KENTUCKY'S AFFIRMATIVE DEFENSES OF ACQUIESCENCE, LACHES, ACCRETION, EROSION AND AVULSION AND, THUS, SUSTAINS KENTUCKY'S CLAIM THAT ITS OHIO RIVER BOUNDARY WITH ILLINOIS IS THE LOW-WATER MARK ON THE ILLINOIS SIDE OF THE RIVER, AS IT EXISTS**

## FROM TIME TO TIME RATHER THAN THE 1792 LOW-WATER MARK?

### A.

#### **The Record Supports Kentucky's Affirmative Defense of Acquiescence.**

The Report is in error in concluding that Kentucky has failed to establish its affirmative defense of acquiescence. Kentucky takes exception to this conclusion.

The Report, in setting the framework for review, correctly places the burden of proof in establishing the affirmative defense of acquiescence on the party asserting it, Kentucky, and that the defense must be demonstrated by a preponderance of the evidence. Report at p. 11.

However, in setting forth and weighing the evidence presented in this case, the Report errs by failing to consider certain uncontroverted evidence presented by Kentucky that establishes its possession and exercise of sovereignty and jurisdiction over the Ohio River to the Illinois shoreline.

Moreover, the Report completely ignores the single most important fact in this case. That is, *Illinois waited for 168 years before it brought an action in this Court to claim the 1792 low-water mark or to contest the boundary to which Kentucky exercises jurisdiction and dominion.*

The doctrine of acquiescence has long been recognized and applied by this Court in resolving boundary disputes between States. See, e.g., *Georgia v. South Carolina*, 497 U.S. \_\_\_ (1990); *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926); *Vermont v. New Hampshire*, 289 U.S. 593, 613 (1933); *Louisiana v. Mississippi*, 201 U.S. , 53 (1906); *Indiana v. Kentucky*, 136 U.S. 479, 509, 510, 518 (1890); *Rhode Island v. Massachusetts*, 4 How. 591, 638-639 (1846).

The Court has stated the rule as follows:



The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority.

*Michigan v. Wisconsin*, 270 U.S. at 308.

Kentucky submits that it has openly and continuously exercised sovereignty and jurisdiction over the entire Ohio River to the current northerly low-water mark on Illinois' shoreline since it became a State in 1792.

Kentucky has always asserted dominion to the prevailing low-water mark on the northerly side. The first recorded history of its assertions is the 1810 legislative enactment referred to in *Ohio v. Kentucky*, 410 U.S. 641, 650 (1973), in which the Kentucky General Assembly enacted a statute that sets the boundary of each county bordering the Ohio River at the northwest side of that river and placed the bed of the river and the islands located in it in each such county. Vol. 1, Stat. of Kentucky, p. 268. This statute has never been repealed.

Since then, in an unbroken line of decisions, Kentucky's highest court has recognized Kentucky's sovereignty over the river to the northerly low-water mark or shore. *Commonwealth v. Henderson Co.*, 371 S.W.2d 27 (Ky. 1963); *Louisville Sand & Gravel Co. v. Ralston*, 266 S.W.2d 119 (Ky. 1954); *Shannon v. Streckfuss Steamers*, 279 Ky. 649, 131 S.W.2d 833 (1939); *City of Covington v. State Tax Commission*, 231 Ky. 606 21 S.W.2d 1010 (1929); *Willis v. Boyd*, 224 Ky. 732, 7 S.W.2d 216 (1928); *Beford-Nugent Co. v. Herndon*, 196 Ky. 477, 244 S.W. 908 (1922); *Nicoulin v. O'Brien*, 172 Ky. 473, 189 S. W. 724 (1916), *aff'd.*, 248 U.S. 113 (1918); *Ware v. Hager*, 126 Ky. 324, 103 S.W. 283 (1907); *Commonwealth v. Louisville & E. Packet Co.*, 117 Ky. 936, 80 S.W. 154 (1904); *Meyler v. Wedding*, 107 Ky. 310, 53 S.W. 809 (1899), *rev'd on other grounds*, 192 U.S. 573 (1899);

*Louisville Bridge Co. v. City of Louisville*, 81 Ky. 189, 5 Ky. L.R. 16 (1833); *Berry v. Snyder*, 66 Ky. (8 Bush.) 266 (1867); *Spalding v. Simms*, 61 Ky. (4 Metc.) 285 (1863); *McFall v. Commonwealth*, 59 Ky. (2 Metc.) 394 (1859); *McFarland v. McKnight*, 45 Ky. (6 B. Mon.) 500 (1846); *Church v. Chambers*, 33 Ky. (3 Dana.) 274 (1835); *Fleming v. Kenney*, 27 Ky. (4 J.J. Marsh) 155 (1830).

When these judicial assertions of Kentucky's jurisdiction and sovereignty over the Ohio River are considered along with the evidence of Kentucky's long and undisturbed assertion of jurisdiction to the Illinois shore and Illinois' long acquiescence to that possession, the general term "northerly low water mark" necessarily must mean the current low-water mark at the time the issue of the boundary was in question.

The Court in *Handly* recognized that Kentucky's boundary with its northern neighbors on the Ohio River was a great natural boundary, established in general terms, with a view toward public convenience and the avoidance of controversy, at the water's edge.

Nothing could be more consistent with this holding than the current low-water mark.

Illinois, since its creation in 1818, has acquiesced to Kentucky's possession and dominion over the river and has failed to take any action or bring any judicial proceeding prior to the instant action, to claim that the boundary is the 1792 low-water mark or to enjoin Kentucky from exercising sovereignty over territory north of the 1792 low-water mark, as a direct infringement upon the sovereignty of Illinois.

In its Brief In Support Of Motion For Leave To File Complaint, Illinois asserts in its *Statement*, at page 12, the following facts in support of its charge that Kentucky has infringed upon the sovereignty of the State of Illinois:

The Commonwealth of Kentucky by the actions of its officials and employees has sought to assert the *present low-water mark as its boundary with Illinois*. For

example, Kentucky has attempted to require all Illinois residents who desire to fish in the Ohio river to obtain Kentucky fishing licenses, *regardless of whether they are fishing to the north or south of the 1792 low-water mark*. Further, Kentucky wardens have ignored even the present low-water mark by seeking to enforce the hunting and fishing laws of Kentucky *up to the northerly shore*, regardless of the river's level.

Similarly, Kentucky has attempted to require all Illinois residents who own boats docked *along the northerly shore* of the Ohio river to have Kentucky boating licenses, *without reference to the location of such boats vis-a-vis the 1792 low-water mark*.

*Kentucky by claiming and asserting jurisdiction up to the present low-water mark and beyond* has sought to divest Illinois of territory properly belonging within its boundaries. Furthermore, Kentucky's attempted exercise of police, regulatory and taxing powers *over the area to the north of the 1792 low-water mark* is a direct denial of the sovereign rights of the State of Illinois over its own territory.

[Emphasis added.]

Moreover, this court has held that *inaction alone* may constitute acquiescence when it continues for a sufficiently long period. See *Georgia v. South Carolina*, 497 U.S. \_\_ (1990); *Rhode Island v. Massachusetts*, 15 Pet. 233, 2744 (1841); *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933).

Illinois waited 168 years, since it became a state, before it brought an action to this Court. Kentucky submits that this alone is a sufficiently long period to constitute acquiescence. Furthermore, Illinois has not alleged or proved that its failure to assert its claim for 168 years is due to any excusable neglect. See *Ohio v. Kentucky*, 410 U.S. 641, 650 (1973).



However, Kentucky submits there is more than this inaction alone to establish its affirmative defense of acquiescence.

To begin, the doctrine of acquiescence may be used only to confirm the current status or *status quo*. *Georgia v. South Carolina*, 497 U.S. \_\_\_ (1990).

The *status quo* in this case is that both states recognize and treat the Illinois shoreline, as the boundary between the two states. Locating and using the 1792 low-water mark would be a *change* from the current situation. Neither state has ever treated the 1792 low-water mark as the boundary line, as neither has ever marked or located that line.

Kentucky submits that for almost 200 years Kentucky has claimed and for 168 years Illinois has acquiesced to the boundary on the river being the current low-water mark or Illinois shoreline. This long acquiescence by Illinois and the mutual understanding by *both* states, that the current low-water mark or Illinois shoreline serves, in day-to-day practice and application, as the boundary. This reflects the *status quo* and a practical location of a common boundary at the current low-water mark or shoreline. See *Arkansas v. Tennessee*, 246 U.S. 158, 172 (1918).

#### (1) ORAL TESTIMONY

The testimonial evidence demonstrates that Kentucky law enforcement officials have always performed their administrative and regulatory functions up to the Illinois shoreline; that Illinois officers and officials have recognized the shoreline as the boundary between the two states; that Illinois has performed no law enforcement on the Ohio River south of its shoreline; that Kentucky coroners exercise jurisdiction and take custody of bodies in the waters of the Ohio River; that Illinois coroners recognize Kentucky jurisdiction in this regard and exercise jurisdiction over a body *only if it is on the Illinois shore*; and that history and custom of the location of the boundary establishes that Kentucky

owns and exercises jurisdiction and sovereignty over the entire river to the Illinois shoreline.

## (2) *DROWNINGS IN THE OHIO RIVER*

In the Report, the Special Master concludes that, "In order for Kentucky to establish support for its position of acquiescence on the part of Illinois, it must be shown that the bodies recovered by Kentucky coroners from the Ohio River were north of the 1792 low-water line, as Illinois acknowledges Kentucky's jurisdiction south of that line." (Report at p. 23). In view of this conclusion, the Report opines that Kentucky's evidence does not show that the bodies handled by the Kentucky coroners took place on the Illinois side of the 1792 low-water mark. (Report at pp. 23-24.) The Report's conclusion in this regard is premised upon a factual predicate that the 1792 low-water line had already been defined, fixed, and was notoriously understood by both states as to its location. Kentucky submits this is hardly the situation. At no time since 1818, when Illinois became a state, has the 1792 low-water mark been located, fixed, plotted, or otherwise established. Moreover, the testimony from coroners of both states, along the river, demonstrates that the 1792 low-water mark was not a consideration when exercising jurisdiction over the bodies of victims who had drowned in the river. Two of Kentucky's coroners (from McCracken and Livingston Counties), testified that if the drowned body is in the river, the Kentucky coroner would exercise jurisdiction over the case (Jerry Beyer Deposition at pp. 15, 19 and Harry Van Smith Deposition at p. 11).

The Report attached considerable weight to the fact that Illinois admitted into evidence 214 drowning reports signed by Illinois coroners. However, the Commonwealth submits these documents do nothing more than show that 214 people drowned in the Ohio River and an Illinois coroner determined the cause of death. The documents do not disclose where and by whom the bodies were recovered and the involvement of Kentucky in

handling the drownings. Moreover, the testimony from several Illinois coroners, along the river, provides significant evidence regarding the practice of recovering drowned bodies in the Ohio River.

For example, when Charles W. Diekroger, the coroner for Massac County, Illinois, finds a body in the Ohio River, he notifies the Kentucky coroner in Paducah, McCracken County, Kentucky (Diekroger Deposition at pp. 5-6). As a result, the Kentucky coroner comes to Illinois, gets the body, and returns it to Kentucky (*Id.* at 6). According to David W. Barkett, the coroner at Alexander County, Illinois, he would exercise jurisdiction over a drowned body if the body is located on Illinois land (Barkett Deposition at pp. 13, 15, 17-18). Consistent with the policy of coroner Barkett, the coroner of Pulaski County, Illinois, Bill E. Atherton, only took jurisdiction over bodies which at the time of his arrival were on Illinois land (Atherton Deposition at pp. 6-10). Even though A. C. Cox, a former coroner for Gallatin County, Illinois, had worked out an agreement with his Kentucky counterpart over drownings in the river, he stated that the present rule is that if a body is in the water, then it goes to Kentucky even though the body is from Illinois (A. C. Cox Deposition at pp. 5-6). Charles A. Cox, the present coroner in Gallatin County, Illinois, subscribed to the same theory as his predecessor by concluding that if the body is in the water, it belongs to Kentucky (Charles A. Cox Deposition at p. 7). When Granville Brownfield, the coroner of Hardin County, Illinois, exercises control over a drowned body, the Kentucky coroner on the opposite side of the river is contacted (Brownfield Deposition at pp. 11-12). Usually when the Kentucky coroner arrives on the Illinois side of the river, the Kentucky coroner gives the Illinois coroner permission to take control of the body (*Id.*).

In view of the testimony given by coroners from both states, the Report simply concludes that the testimony demonstrated informal practical accommodations and these accommodations did

not "constitute acquiescence since they are not based on any concession of right by either side, but rather, [were] brought about by uncertainty by both sides as to the location of the actual boundary." (Report at p. 24.) Because the Report concludes that there was uncertainty about the boundary with respect to coroners exercising control over drowned bodies, Kentucky submits that the Report's previous conclusion is erroneous where it opines that Kentucky's evidence did not show that any of the drownings occurred north of the 1792 low-water mark. In short, no one could show that the bodies were recovered north of the 1792 low-water mark when no one knew exactly where it was located.

### (3) *EMERGENCY SITUATIONS ON THE RIVER*

Kentucky's evidence presents two (2) emergency situations on the river which are typical of Illinois' recognition that Kentucky's boundary is the northwestern shore as it exists from time to time.

During a labor dispute at a coal terminal on the Illinois bank, the United States Coast Guard established a security zone on the river to prevent boats from entering the area (John L. Bailey Deposition at pp. 5-9). Kentucky and Illinois were requested to provide uniformed law enforcement personnel (*Id.* at 8, 10). Illinois agreed and put a trooper on a Coast Guard patrol boat, but the Illinois officer-in-charge stated that Illinois had no authority on the river (*Id.* at 20). The commanding officer of the Illinois troopers also expressed the same view as the officer-in-charge (*Id.* at 20).

The second situation concerned a burning tow boat, *the Bayou Cauba*, located approximately 5 to 10 feet from the Illinois shore (Captain Thomas Robinson Deposition at pp. 6-7). When the Coast Guard arrived on the scene, the Golconda Illinois Volunteer Fire Department was there but they were standing around as the boat was afire (*Id.* at p. 7). The fire fighters were unwilling to get involved for two reasons. One reason was because they felt they did not have the expertise and, two, they indicated that because the

fire was on a tow boat *in the river*, it was the State of Kentucky's problem and not the State of Illinois'; that they had no jurisdiction and they were concerned about their liability if they were to attempt to fight a fire in an area that was not under their jurisdiction (Robinson Deposition at pp. 7, 9).

As a result, the Coast Guard contacted Kentucky Disaster and Emergency personnel who assisted in extinguishing the fire (*Id.* at pp. 7-8).

With respect to the aforementioned evidence, the Special Master's Report concludes that, "I find that their testimony, as a whole, provides very little support for Kentucky's claim of acquiescence, as it reflects the sort of uncertainty and confusion that are incompatible with a finding of acquiescence." (Report at 25.) Kentucky submits that the evidence in question is compatible with Kentucky's claim of acquiescence. Moreover, the evidence demonstrates that Kentucky exercised its jurisdiction over the breadth of the river.

#### (4) *ENFORCEMENT OF LAWS ON THE OHIO RIVER BY KENTUCKY WATER PATROL AND DEPARTMENT OF FISH AND WILDLIFE*

In his Report, the Special Master concludes that the testimony of four (4) witnesses from Kentucky's Water Patrol and Department of Fish and Wildlife did not support Kentucky's position that its boundary with Illinois is the low-water mark on the northerly side of the Ohio River as it exists from time to time. Report at p. 22. The basis for the Report's conclusion is that the testimony of the witnesses could not be accepted in view of "Kentucky's prior repeated official statements claiming the low-water mark as it existed in 1792 when Kentucky became a state . . . ." *Id.*

However, Kentucky submits that the Report ignores valuable testimony which establishes Kentucky's law enforcement activities on the river. Three vital points are made by the testimony. First,



Kentucky water patrol personnel enforce the boating laws to the Illinois shoreline. (Deposition of Steve Owens, Filing No. 23(d) at pp. 5, 19, and Deposition of Claude Storms, Filing No. 23(a) at p. 6.) Secondly, Illinois *does not* patrol or police the Ohio River. According to the testimony of Officers Owens and Storms, they never encountered any Illinois law enforcement officials (state, county or any other jurisdiction) on the Ohio River. (Owens' Deposition, Filing No. 23(d) at p. 5, and Storms' Deposition, Filing No. 23(a) at p. 8.) Third, Illinois has not presented any evidence that it patrols or polices the Ohio River.

The enforcement of Kentucky's hunting and fishing laws by the Department of Fish and Wildlife, is consistent with the enforcement of boating laws. Fish and Wildlife personnel enforce the laws up to the Illinois bank (Deposition of Donan Jenkins, Filing No. 23(b) at p. 4) or when the river overflows, up to the standing pool. (Deposition of David Loveless, Filing No. 23(c) at pp. 7, 15-16.) According to officers Jenkins and Loveless, they have not seen any Illinois fish and wildlife personnel active on the river. (Loveless' Deposition, Filing No. 23(c) at pp. 10-12, and Jenkins Deposition, Filing No. 23(b) at p. 5.)

As previously discussed, Kentucky has always enforced its laws up to the Illinois shore. This enforcement is consistent with the Statement in Illinois' Bill of Complaint where it stated:

The Commonwealth of Kentucky by the actions of its officials and employees has sought to assert *the present low-water mark as its boundary with Illinois*. For example, Kentucky has attempted to require all Illinois residents who desire to fish in the Ohio river to obtain Kentucky fishing licenses, *regardless of whether they are fishing to the north or south of the 1792 low-water mark*. Further, Kentucky wardens have ignored even the present low-water mark by seeking to enforce the hunting and fishing laws of Kentucky *up to the northerly shore*,

*regardless of the river's level.*

Similarly, Kentucky has attempted to require all Illinois residents who own boats docked *along the northerly shore* of the Ohio to have Kentucky boating licenses, *without reference to the location of such boats vis-a-vis the 1792 low-water mark.*

Bill of Complaint at p. 12. [Emphasis added.]

Kentucky did not and does not deny the statement made by Illinois. Kentucky's exercise of its boating laws to the northerly shore does not deny Illinois of its sovereign rights.

Policing or patrolling the river is a consideration to which this court has attached weight when there is a boundary dispute and acquiescence has been raised. See *Georgia v. South Carolina*, 497 U.S. \_\_ (1990). Kentucky submits that its uncontroverted evidence regarding policing the river and Illinois' *failure* to police the river is evidence which the Report ignores. Thus, the aforementioned evidence is indicative of Kentucky's exercise of sovereignty over the breadth of the river. See *Georgia v. South Carolina*, *supra*.

#### (5) BRIDGES

The Report is in error when it concludes that Kentucky's evidence regarding bridges fails to support its claim of acquiescence. It shows that Illinois has agreed and recognized through its state officials and bridge agreements that Kentucky's jurisdiction on the river extends to the low-water mark on the Illinois side; to the Illinois shoreline; to the mean, normal, water elevation on the Illinois shore; and to the north normal pool line.

For example, in September, 1954, H. E. Diers, Assistant Engineer of Maintenance, Illinois Department of Public Works and Buildings wrote a letter to W. J. Crouse, Director, Division of Maintenance, Kentucky Department of Highways concerning the placement of signs on the Ohio River Bridge near Cairo, Illinois marking the Illinois-Kentucky boundary line. (Filing No.12(l),

## Exhibit 6.)

In his letter, he cites two boundary descriptions found in the Illinois State Library in Springfield, Illinois which describe the boundary as the northwestern bank of the Ohio River. He then states:

It is possible that this point can be fixed on the shore line at the mean, normal, water elevation along the Illinois shore. This can probably be determined by examination of the gauge readings in the U. S. Engineers' Office at Cairo and a point set on the bridge directly above this point.

In addressing this evidence, the Report concludes:

[I]t is my opinion that the purpose of the Dier (sic) correspondence was not to locate the state boundary precisely but simply to place a sign on the bridge somewhere *near the approximate state line to alert motorists that they were entering or leaving Kentucky or Illinois.*

Report at p. 26. [Emphasis added.]

This dramatically supports Kentucky's position in this case. It shows: that an Illinois official recognized that Kentucky's jurisdiction over the river extends to the shore line at the mean, normal water elevation along the Illinois shore; that the official notified the Kentucky Highway Department that placing a state sign on the bridge directly above that point would be the appropriate place to indicate where the jurisdiction of one state begins and the other ends. Such a sign would assist in determining jurisdiction, for example, in the case of an accident on the bridge.

Although the Report concludes that the terms used in the Diers correspondence to describe the location of the boundary "hardly reflect certainty" (Report at p. 26), Kentucky submits that the terms of description are consistent with and support Kentucky's



position in this case.

In regard to Kentucky's evidence concerning the bridges over the Ohio River which connect Kentucky with Illinois, the Report concludes that the evidence is equivocal at best and does not support Kentucky's claim of acquiescence. To this Kentucky excepts.

*Cairo Bridge* - Kentucky introduced an April, 1977 Restoration and Rehabilitation Agreement between Kentucky and Illinois involving the Cairo Bridge wherein the boundary between the two states is described as follows:

WHEREAS, KENTUCKY desires to use said Great River Road funds allocated to KENTUCKY for the portion of the CAIRO BRIDGE deck restoration and rehabilitation south of the ILLINOIS-KENTUCKY State Line, said State Line being previously legislatively established as *the low water mark on the ILLINOIS side of the Ohio River*, and, for the purposes of this Agreement, specified as centerline of Pier B or *Station 20+10.00*.

[Emphasis added.] (Filing No. 61, Exhibit 54.)

To determine and identify the location of *Station 20+10.00*, Kentucky introduced the affidavit of Charles S. Raymer, Engineer, Kentucky Transportation Cabinet, Department of Highways, Director of the Division of Design. (Filing No. 61, Exhibit 55.) Mr. Raymer was asked to examine the General Plan and Elevation Drawing, Cairo Bridge Commission, Ohio River Bridge (Filing No. 61, Exhibit 56) to determine where *Station 20+10.00*, as depicted in the drawing, was located in relation to the Ohio River and the Illinois shore. Mr. Raymer concluded that *Station 20+10.00*, as depicted on the drawing, was located at and was equivalent to the shoreline on the Illinois side of the Ohio River. (Filing No. 61, Exhibit 55.)

*I-24 Bridge* - Kentucky introduced an April, 1965 Bridge Construction Agreement between Illinois and Kentucky for the I-24

Bridge. (Filing No. 61, Exhibit 61.) In sections 6 and 9 of the Construction Agreement, both states agreed that the north normal pool line shall be considered as the boundary line between the State of Illinois and the Commonwealth of Kentucky. The north normal pool line was to be determined and designated by the Corps of Engineers, U.S. Army.

Kentucky submits that the north normal pool line is equivalent to the current low-water mark, as it may exist from time to time or in this instance the Illinois shoreline.

This agreement by the two states that the north normal pool line be the boundary supports Kentucky's exercise of sovereignty over the entire river to the shoreline and Illinois' acquiescence and acceptance of same.

The Report's inference that these bridge agreements as to the boundary were made merely to facilitate the construction of the bridges is without support. In Kentucky Legislative Research Commission's Informational Bulletin No. 81, VII Administrative Comments, the Kentucky Department of Highways states that is customary in the construction of each interstate bridge to have a survey made toward the establishment of the state boundary in the area of the bridge. (Filing No. 12(b), p. 106.) The fact is, the line agreed upon demonstrates Illinois' acquiescence to Kentucky's authority over the breadth of the river.

#### (6) *TAXATION*

In the Report, the Special Master concludes that the evidence regarding the taxation of structures on the river hardly demonstrate that Kentucky has asserted exclusive jurisdiction over the entire breadth of the Ohio River.

The Report ignores Illinois' statement in the Bill of Complaint which states:

Kentucky by claiming and asserting jurisdiction up to the present low-water mark and beyond has sought to divest Illinois of territory properly belonging within its

boundaries. Furthermore, Kentucky's attempted exercise of police, regulatory and *taxing powers over the area to the north of the 1792 low-water mark* is a direct denial of the sovereign rights of the State of Illinois over its own territory.

[Emphasis added.]

*Taxation of service companies* - There are fifteen (15) structures located along the Illinois shore of the Ohio River, portions of which extend past the shoreline into the river. (Filing No. 56, Exhibit 104(A) to (O).) With respect to these fifteen (15) structures, Kentucky has taxed two (2) of them. Kentucky imposed a property tax on Bulk Service Company of Granite City, Illinois. (Filing No. 61, Exhibit 86-92.) The tax bill covered 250 feet of the conveyor belt belonging to Bulk Service on the Illinois side of the river (Kentucky Exhibit 86). After receiving notification of the property tax, correspondence between Bulk Service and the Ballard County, Kentucky Property Valuation Administrator commenced. (Filing No. 61, Exhibit 87-88.) Upon responding to Bulk Service's correspondence, the Property Valuation Administrator informed the company that, "... our records show that the borders go to the low water mark or water edge. Therefore, approximately 250 feet to 300 feet of conveyor belt is on the Kentucky side of the river. This tax is due in Ballard County." (Filing No. 61, Exhibit 88.)

Kentucky also imposed a property tax against Electric Energy, Inc. of Joppa, Illinois (Filing No. 61, Exhibit 93), which is located on the Illinois shore.

Illinois Exhibit 64 indicates that Bunge Corporation was assessed by Illinois. The affidavit from the Alexander County Tax Assessor demonstrates that the Bunge property, which extends into the river, was proportioned for tax purposes based upon the boundary between the states. The tax assessor relied upon a 1949 *plat* prepared by the Illinois Central Railroad, not the 1792 low-water mark which Illinois presently claims to be the boundary

line. The tax assessors from Massac County and Pulaski, Illinois expressly admitted that they do not tax real property located south of the shoreline. (Filing No. 56, Exhibits 72 and 83.) Moreover, the tax assessors for Hardin and Gallatin County, Illinois are uncertain as to whether the structures extending past the Illinois shoreline are included in their tax records. (Filing No. 56, Exhibits 98 and 103.)

Based on the property tax levied against the two structures by Kentucky and the structure which Illinois maintains it has assessed, the Special Master concluded that the evidence shows there is uncertainty in both states as to the exact location of the boundary. Report at p. 37. Even if weight is given to Illinois' taxation of Bunge Corporation, the boundary line used by the tax assessor was established in 1949 and not 1792.

Kentucky's taxation of the aforementioned service companies demonstrates that it taxes up to the northerly shore. Moreover, Illinois maintains that it taxes at least one structure. However viewed, the evidence shows that Illinois does not tax the remaining fourteen (14) structures, all of which have property originating from the northerly bank into the Ohio River.

*Taxation of barges* - Kentucky imposes an *ad valorem* tax on the operation property (barges, tow boats, etc.) owned by four (4) barge companies located in Illinois. (Filing No. 61, Exhibits 77-82.) However, the Report concludes that the taxation of barges and other watercraft traveling the Ohio River does not support Kentucky's claim of exclusive jurisdiction of the entire breadth of the river. Report at p. 38. The Report reaches the aforementioned conclusion because the "sailing line" on the river is either close to the center of the river or near the Kentucky shore. Report at p. 38. It is therefore opined that the sailing line rarely approaches to within 250-300 feet of the Illinois shore (*Id.* at 38).

Kentucky submits that the "sailing line" is not a valid consideration. Kentucky taxes *all* barges using the Ohio River. This includes those barges which load and unload from the Illinois

shore. In *Union Barge Line Corporation v. Marcum*, 360 S.W.2d 130 (1962), Kentucky's then highest court held that the Virginia Compact and the Northwest Ordinance did not impair Kentucky's power to impose taxes on property used on the Ohio River.

#### (7) MINERAL LEASES

The Report errs when it concludes that Kentucky's evidence of mineral leases granted by three Kentucky counties to private companies or individuals to dredge the river bottom north of the thread of the stream within the boundary of the county, "adds nothing to the determination of the location of the Ohio River boundary of those counties." Report at p. 39.

Kentucky takes exception to this conclusion and to the fact that the Report failed to consider other supporting evidence introduced by Kentucky concerning mineral leases that, taken together, establish Kentucky's exercise of dominion and jurisdiction to the low-water mark on the northern shore. (Filing No. 61, Exhibits 114-116, 121.)

Kentucky Revised Statute (KRS) 56.220 gives the county judge/executive of each county bordering on the Ohio River authority to lease all that portion of the river bed lying north of the thread of the stream for the dredging of sand and gravel. (Filing No. 61, Exhibit 114.)

In *Louisville Sand and Gravel Co. v. Ralston*, Ky., 266 S.W.2d 119 (1954), the Kentucky Court construed the term "thread of the stream" as applied to the Ohio River under a lease from a county for dredging sand and gravel pursuant to KRS 56.220. The term meant the middle line of the Ohio River as measured from the state's northern boundary, *the low-water mark on the northern bank or shore*, and the corresponding bank on the southern bank or shore. The Kentucky Court thus defined the county's northern boundary on the Ohio River as extending to the low-water mark on the northern shore. (Filing No. 61, Exhibit 116.)



Kentucky submitted evidence of lease/franchise agreements entered into by three Kentucky counties bordering the Ohio River opposite Illinois granting to private companies or individuals the right to dredge sand and gravel from the bed of the Ohio River lying north of the thread of the stream, within the boundary of the county. (Filing No. 61, Exhibits 117, 118, 119.) As set out above, under KRS 56.220 and *Louisville Sand and Gravel Co., v. Ralston, supra*, "within the boundary of the county" would be from the thread of the river to the low-water mark on the northern bank or Illinois shore. In *Commonwealth v. Henderson County, Ky.*, 371 S.W.2d 27 (1963), the Kentucky Court held that, under KRS 56.220, a county's authority to grant mineral leases in the bed of the Ohio River was not limited to sand and gravel, but also included oil and gas. (Filing No. 61, Exhibit 115.)

In September, 1952, Kentucky leased about 150 miles of the bed of the Ohio River to a private company formed to drill oil and gas wells. The lease included riverbed in Crittenden County, Kentucky, which is opposite to and extends to the Illinois shore. (Filing No. 61, Exhibit 121.)

Kentucky submits that mineral lease/franchise agreements by Kentucky counties granting dredging and drilling rights to private companies and individuals to the low-water mark on the Illinois shore is evidence that Kentucky has exercised dominion and jurisdiction over the full breadth of the river.

#### (8) *FISHING*

The Report is in error when it concludes that evidence submitted by Kentucky regarding fishing licenses does not support Kentucky's claim of exclusive jurisdiction over the river. Report at p. 40. Filing No. 61, Exhibits 122-139, establish that Kentucky issues special licenses for sport and commercial fishing on the Ohio River only. These licenses were created and sold exclusively to citizens of Illinois, Ohio, and Indiana. (Filing No. 61, Exhibits 122-125.) On November 11, 1988, the Kentucky fishing statutes



were amended by regulation, which eliminated these special fishing licenses (sport and commercial). Instead, Kentucky now requires residents of Illinois, Ohio, and Indiana to purchase the Kentucky nonresident license. (Filing No. 61, Exhibits 123-139.)

The Report reasons that no matter where the 1792 low-water mark is located, the area south of that mark is within Kentucky and a license would be required for fishing that area. Report at p. 39. The Report also concludes that "given the current absence of a clear understanding of the exact location of the boundary, a prudent resident of Illinois would acquire a Kentucky Ohio River license along with his own State's license in order to be sure he was licensed to fish the entire breadth of the river." Report at p. 40.

Kentucky submits that the Report again ignores the evidence and draws its conclusion based on a boundary line which has not been fixed, plotted or designated. No weight is given the evidence even though it is uncontroverted.

As previously mentioned, Illinois stated in its Bill of Complaint the following:

The Commonwealth of Kentucky by the actions of its officials and employees has sought to assert the *present low-water mark as its boundary with Illinois*. For example, Kentucky has attempted to require all Illinois residents who desire to fish in the Ohio river to obtain Kentucky fishing licenses, *regardless of whether they are fishing to the north or south of the 1792 low-water mark*. Further, Kentucky wardens have ignored even the present low-water mark by seeking to enforce the hunting and fishing laws of Kentucky *up to the northerly shore*, regardless of the river's level.

Kentucky's enforcement of its fishing laws to the northerly shore does not deny Illinois of its sovereign rights.

(9) *WATERFOWL*

Kentucky submitted evidence of an historical account of a waterfowl enforcement problem that arose nearly 40 years ago along the Ohio River for hunters from Ohio, Indiana and Illinois. It concerned duck hunting along the Ohio River when the northern boundary states' hunting seasons were open and Kentucky's closed. (Filing No. 61, Exhibits 140-148.)

The Report errs in holding that this evidence is irrelevant as hardly applicable to Illinois and because it contains hearsay statements. Report at p. 40.

Kentucky takes exception to this. The evidence is relevant because it is further evidence that Kentucky has always enforced its fishing and hunting laws up to the Illinois shoreline of the Ohio River. Moreover, hearsay evidence arising before the controversy is admissible under Federal Rules of Evidence, Rule 803(20) to prove boundaries.

(10) *ILLINOIS ENABLING ACT, ILLINOIS CONSTITUTIONS  
AND JOINT SELECT COMMITTEE*

Pursuant to the Illinois Enabling Act, enacted by Congress on April 18, 1818, Illinois' boundary with Kentucky was to run along the north-western shore of the Ohio River. 3 Stat. 428 (1818).

Illinois in its Constitutions of 1818, 1848 and 1870 all specifically describe its southern boundary with Kentucky on the Ohio River "along its northwestern shore." (Filing No. 14, Exhibits 1, 2, 3.)

The "Report of the Joint Select Committee Appointed to Investigate the Nature and Extent of the Jurisdiction of Illinois Over the Ohio River: was prepared by an Illinois legislative committee that was appointed to investigate the nature and extent of the jurisdiction of Illinois over the Ohio River." (Filing No. 14, Exhibit 5.)

The report which was submitted to the Illinois Legislature on, January 25, 1849, makes the following statement:

It is conceded that the Ohio river, to the low water mark, is included within the limits of the state of Kentucky.

Report of Joint Select Committee at 1.

The Special Master did not give any weight to the 1818, 1848 and 1870 Illinois Constitutions or the findings of the Illinois Joint Select Committee. Report at pp. 28-29.

These historical documents, particularly the committee report which addressed the issue precisely before this Court, illustrate that the boundary between the states was to be a natural one defined in general terms. See *Handly*, at 383, 384.

Thus, Kentucky submits these documents use of the general term *low-water mark along its northwestern shore* rather than the 1792 low-water mark shows that Illinois has always recognized that its boundary along the Ohio River, is the low-water mark, which is ever changing.

#### (11) GEOGRAPHY OF ILLINOIS

The Report erred in excluding from evidence the *Geography of Illinois*, written by Douglas C. Ridgley and published in 1921 by the University of Chicago which was submitted by Kentucky. Report at p. 29.

Such evidence is relevant and admissible to show reputation in the community, arising before the current controversy as to the understanding of the boundary. Federal Rules of Evidence, Rule 803(20).

The book in a section titled *Legal State Boundary* makes the following statement concerning the location of Illinois' southern boundary along the Ohio river, at page 2:

The southern boundary is along the northwest shore of the Ohio River, for the Kentucky boundary along the Ohio had already been established on the north side of the river. It thus happens that the Ohio River and its islands are in Kentucky, not in Illinois, Indiana, or Ohio.

Kentucky takes exception to the exclusion of this evidence. It shows the understanding among the general population as to the boundary between Illinois and Kentucky.

(12) *HISTORICAL EVIDENCE*

Kentucky submitted a series of newspaper articles dating from 1919 to 1942 which reflected the common understanding in the community of Kentucky's northern boundary, i.e., that Kentucky owned and had jurisdiction over the Ohio River in its entirety, up to the northern low-water mark or shoreline.

The Report sustained Illinois' objection to all the newspaper articles submitted by Kentucky on the ground of relevancy and for containing hearsay and improper opinion testimony. Report at p. 38.

Kentucky takes exception to this. Under Federal Rules of Evidence, Rule 803 Hearsay Exception; Availability of Declarant Immaterial, Rule 803(2) states:

Reputation Concerning Boundaries or General History.  
Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

Newspaper accounts, which are among the source materials of history, are admissible under Rule 803(20) to establish the reputation in the community as to boundaries. See *Montana Power Co. v. Federal Power Commission*, 15 F2d 491, 498 (1950); *Conn. Light and Power Co. v. Federal Power Com'n.*, 557 F2d 349, 356 (1977).

The Report erred in not admitting into evidence the newspaper articles Kentucky submitted in this case, (Filing No. 61, Exhibits 157-161), as well as (Filing No. 61, Exhibits 66a, 83-85, 120, 121, 138, 139, 145, 147, 148, 162 163).

## B.

**Evidence Submitted by Illinois  
in Opposition to Kentucky's Claim**

(1) *ILLINOIS CASE DECISIONS*

The Report concludes that Illinois asserted jurisdiction over an *undefined* portion of the river and therefore had not acquiesced to Kentucky's exclusive assertion of authority. Report at p. 35. Kentucky takes exception to this conclusion.

Illinois submitted evidence which it claims was proof that it had not acquiesced to Kentucky's authority. This evidence included published decisions by Illinois appellate courts, city ordinances, and permits authorizing dredging, disposal of sewage, and construction of structures. Kentucky submits none of this evidence proves that Illinois has not acquiesced.

Illinois and the Special Master place heavy reliance on the holding in *Joyce-Watkins Co. v. Industrial Commission*, 325 Ill. 378, 156 N.E. 346 (1927). In *Joyce-Watkins*, an Illinois court recognized that the boundary between Illinois and Kentucky on the Ohio River is the "low-water mark." 156 N.E. at 347. The court construed this term to mean, "the point to which the water receded at its lowest stage." *Id.* at 348.

The *Joyce-Watkins* court refused to address the plaintiff in error's contention that the boundary was the 1818 low-water mark, because Illinois was not a party to the action. *Id.* However, the court did recognize that the low water as boundary was not a "definitely fixed line," but would move over time. *Id.*

*People Ex Rel. Scott v. Dravo Corporation*, 10 Ill. App. 3rd 944, 295 N.E.2d 284 (1973), like *Joyce-Watkins*, did not decide the boundary between Kentucky and Illinois.

Kentucky submits that *Joyce-Watkins* and *Dravo Corp.*, *supra*, merely demonstrate that the Ohio River is an ever changing boundary and Illinois has judicial jurisdiction over matters within her boundary. These cases do not fix, designate, or recognize the



1792 low-water mark as the boundary between the states.

Filing No. 55, Illinois Exhibits 34-36, 38, 40, 42-46, 49, 51-55 are copies of Illinois city ordinances or leases that assert that the city's jurisdiction extends to the low-water mark or the water's edge at low-water mark of the Ohio River.

In particular Exhibit 47 is a Metropolis, Illinois ordinance which describes a portion of the city limits along the Ohio River as the "low water mark of 1873 on the State Line of Illinois and Kentucky."

Although the delineation of the city's jurisdiction as the low-water mark of 1873 is unexplained, this evidence supports Kentucky's position that the boundary is not, and never has been, a fixed line as of 1792.

Illinois Exhibits 54 and 55 present copies of Illinois Acts of 1867 and 1859 respectively, which describes the corporate limits of Cairo, Illinois as extending to the "middle of the main channels of the Ohio and Mississippi Rivers" and the boundary of the newly merged city of Mound City, Illinois along the Ohio River as "the middle of the main channel of the Ohio River."

To the extent these Acts extend the corporate boundaries beyond the low-water mark, they are inconsistent with and violate the Illinois Constitutions of 1818, 1848 and 1870, which described the state's boundary as extending only to the northwestern shore. Contrary to the Special Master's finding (Report at pp. 32-35), the Acts neither support Illinois' position nor refute Kentucky's defense of acquiescence.

Illinois' admission of 73 permits concerning construction of docks, mooring anchors, access ramps on or over the river, sand and dredging, bridge construction, bank protection and sewage outlets do not prove that Illinois has not acquiesced to Kentucky's exercise of jurisdiction.

Regarding the construction of piers and wharves, this Court in *New Jersey v. Delaware*, 291 U.S. 361 (1933) states the following:



The acts of dominion by riparian proprietors are connected with the building of wharves and piers that project into the stream. The structures were built and maintained without protest on the part of Delaware, and no doubt with her approval. *There is nothing in their presence to indicate an abandonment by the Sovereign of title to the soil.* By the law of waters of many of our states, a law which in that respect has departed from the common law of England, riparian proprietors have very commonly enjoyed the privilege of gaining access to the stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state.

*Id.* at 375. [Emphasis added.]

The Court also concluded that "from acquiescence in these improvements of the river front, there can be no legitimate inference that Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers." *Id.* at 375-376.

Consistent with *New Jersey v. Delaware*, Kentucky recognizes the rights of Illinois to systematically develop its shore and the riparian right of accessibility to the river. However, such recognition does not divest Kentucky of its boundary to the present low-water mark.

(2) KENTUCKY ATTORNEY GENERAL OPINION AND  
LEGISLATIVE RESEARCH COMMISSION BULLETINS  
AND PERKS V. McCRACKEN

The report is erroneous when it concludes that a Kentucky Attorney General's Opinion, OAG 63-847 and two Information Bulletins No. 81 and No. 93, published by the Kentucky Legislative Research Commission and a decision by a Kentucky court in *Perks v. McCracken*, 169 Ky. 590, 184 S.W.2d (1916), overcome Kentucky's position that it has always asserted dominion

and jurisdiction over the entire Ohio River to the prevailing northerly low-water mark or shoreline. To this, Kentucky takes exception.

(3) *KENTUCKY OAG 63-847*

This opinion, *issued in 1963*, was not written in the context of an original action before this Court regarding the location of a boundary between two states. As such it is only advisory in nature and cannot be considered as controlling authority in this case. Moreover, the opinion, OAG 63-847, is inaccurate because it misconstrues the holding in *Indiana v. Kentucky* for the reasons stated in our Argument I, (*supra*).

On pages 105-107 of Kentucky Legislative Research Commission Informational Bulletin No. 81, published in 1969, under the heading of "VII Administrative Comments" the results of inquiries of departments of Kentucky State government whose administration was actively concerned with problems encompassing the Ohio River as a state boundary are recorded. (Filing No. 12(b).)

Under Department of Fish and Wildlife Resources, the following is stated:

The Department's policy is to enforce Kentucky fishing regulations to the natural shoreline on the opposite bank except for embayments. Residents of Ohio, Indiana, and Illinois may fish with what are known as the Kentucky Ohio River Sport Fishing License or the Kentucky Ohio River Commercial Fishing License. These licenses are good only on the Ohio River and may be purchased for the same fee that a resident of Kentucky pays for Kentucky resident licenses.

[Emphasis added.]

Footnote one of this section indicates that this information as to the Department's policy of enforcing its fishing regulations came

from a letter from Minor Clark, Commissioner of Fish and Wildlife Resources.

This is the same Commissioner to whom OAG 63-847 was written. Thus despite the conclusions in the attorney general's opinion, the Kentucky Department of Fish and Wildlife's policy was to enforce its laws to the shoreline.

This evidence is consistent with the testimony of Fish and Wildlife Officers David Loveless and David Donan Jenkins who testified that they enforced Kentucky's fishing laws up to the Illinois shoreline. (Loveless Deposition, Filing No. 23(c) at pp.15-16; Jenkins Deposition, Filing No. 23(d) at p. 5.) Note particularly Officer Jenkins testimony since he had been enforcing these for over 30 years. A time period which includes the time of the policy statement of the Commissioner and OAG 63-847. (Jenkins Deposition, Filing No. 23(d) at p. 2.)

Thus, despite the issuance of OAG 63-847, Kentucky's Department of Fish and Wildlife, continued to exercise dominion and jurisdiction up to the current low-water mark or Illinois shoreline.

(4) *KENTUCKY LEGISLATIVE RESEARCH COMMISSION  
INFORMATIONAL BULLETINS NO. 81 AND NO. 93*

These Informational Bulletins were published in 1969 and 1972.

After Ohio filed suit against Kentucky in 1966, the Kentucky legislature established a subcommittee to study the boundary question.

In the Forward of Informational Bulletin No. 81, the Director of the Legislative Research Commission states that the Commission voted to establish a Subcommittee on the Ohio River Boundary and charged it to make a long range comprehensive study of all facets of the boundary problem.

In concluding this Forward, the Director states:

This first report of the Subcommittee is concerned primarily with that portion of the river forming the boundary between the State of Ohio and the Commonwealth of Kentucky; precedence was given this part of the boundary since the State of Ohio had filed an original action concerning the boundary against the Commonwealth in the October, 1965 term of the Supreme Court of the United States. *Because of this pending litigation, no attempt has been made to reach conclusions or to summarize this work.* The material presented here is fully cited and documented. Several works of interest were examined but not used in this report. Much of that material will form the basis of the second report of the Subcommittee covering that part of the Ohio River from the Great Miami to the Mississippi. [Emphasis added.]

The Special Master's Report erroneously concludes that mention in this Forward of concern over the recurrence, over a hundred and fifty year period, of litigation over the location of Kentucky's northern Ohio River boundary is inconsistent with Kentucky's contention in this case that it has continuously asserted the low-water mark as it exists from time to time as its boundary with Illinois. Kentucky submits there has been no recurring litigation with Illinois over the boundary between the two states.

Informational Bulletin No. 93, *published in 1972*, covers Kentucky's Ohio River boundary from the Great Miami River to the Wabash River which covers Kentucky's boundary with Indiana.

The Report, in quoting from the narrative portion of the Legal Opinion, overlooks the clearly stated conclusion of that opinion, which reads, in relevant part:

In conclusion, from examination of the historical documents, the statutes of the various states, the constitutions of the states, and the physical evidence we

can only conclude that the boundary of Kentucky is as it has always been claimed; that the entire river Ohio for the 664 miles that it flows past Kentucky belongs to Kentucky . . . .

[Emphasis added.] Kentucky Legislative Research Commission, Information Bulletin No. 93, p. 4.

That conclusion reflects the official position consistently enacted by Kentucky's legislature. In 1810, the Kentucky legislature enacted a statute asserting its sovereignty over the entire river. This was reaffirmed with the concurrence of Indiana in the Compact agreeing to the boundary between Kentucky and Indiana as the abandoned-channel boundary fixed at Green River Island in *Indiana v. Kentucky* and "thence upstream" and "thence downstream" respectively with the low-water mark of the Ohio River on that side. 1942 Ky. Acts, Ch. 116; 1943 Ind. Acts, Ch. 2; 57 Stat. 248 (1943).

Kentucky submits that these Informational Bulletins, No. 81 and No. 93 issued by the Kentucky Legislative Research Commission do not and cannot represent the sovereign position of the Commonwealth nor are they binding authority in this litigation. They simple do not refute Kentucky's continuous exercise of jurisdiction and dominion over the entire river to the Illinois shoreline.

##### (5) *PERKS V. McCRACKEN*

The Report erroneously concludes that the Kentucky court decision in *Perks v. McCracken*, 169 Ky. 590, 184 S.W. 89 (1916), defines Kentucky's Ohio River boundary specifically as the 1792 low-water mark.

The case involved a private lawsuit by McCracken against Perks and another based upon his claim that he owned a towhead or island sand bar in the Ohio River near Mound City, Illinois, and that the defendants had unlawfully removed sand and gravel from the towhead.



The case turned on whether the island was in Kentucky territory or was a part of Illinois. The answer depended upon whether the island in question was between the low-water mark on the north side as it existed when Kentucky became a state and the Kentucky shore. The Court found that it was and thus, the island was part of Kentucky.

This is the same legal test applied in *Indiana v. Kentucky* to determine in which state an island belonged, i.e., if the island was within Kentucky's jurisdiction when it became a state, no subsequent change in the river could divest it of its jurisdiction over that island. Reference to the 1792 line was only necessary to determine if the island was within Kentucky's jurisdiction when it became a state.

Thus, Kentucky submits the case simply determined the jurisdiction of an island. It did not specifically define Kentucky's boundary along its entire boundary with Illinois as the 1792 low-water mark.

#### (6) LACHES

Whether the equitable considerations of Illinois' 168 year delay in bringing its claim to this Court are addressed in terms of laches or prescription and acquiescence, the effect of the delay is the same.

As the Court, in *Indiana v. Kentucky*, stated in discussing Indiana's 70 year delay in asserting its claim to Green River Island:

Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. . . . On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and



yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil.

163 U.S. at 510.

Kentucky submits that Illinois' stale claim has resulted in the unavailability of generations of witnesses whose testimony could have established Kentucky's assertion of sovereignty and jurisdiction to the current low-water mark or shoreline and Illinois' acquiescence thereto.

This long delay should be considered both in terms of *laches* as it relates to the inequitable loss of available evidence and *acquiescence* in the sense that inaction alone can establish that affirmative defense when it continues for a sufficiently long period. *Georgia v. South Carolina*, 497 U.S. \_\_ (1990).

### III.

**WHETHER THE CONSTRUCTION OF DAMS ON THE OHIO RIVER BETWEEN ILLINOIS AND KENTUCKY PERMANENTLY RAISED THE LEVEL OF THE RIVER ABOVE ITS LEVEL IN 1792, AND AS A RESULT, THE PRESENT LOW-WATER MARK ON THE ILLINOIS SIDE OF THE RIVER IS FARTHER NORTH THAN IT WAS IN 1792, IS NOT BEFORE THE COURT AT THIS TIME.**

#### A.

#### *ACCRETION, EROSION AND AVULSION*

It is Kentucky's position that if it prevails on its affirmative defense of acquiescence, then the well-recognized principles of accretion, erosion and avulsion would obviously apply to a current shoreline boundary as it may change from time to time. Kentucky excepts to the Report's conclusion that *Ohio v. Kentucky*, 444 U.S. 335 (1980) prohibits the application of the principles of accretion, erosion and avulsion, because the Court in that case did not

consider the defense of acquiescence or reject that affirmative defense in reaching the majority decision.

## B.

### CONSTRUCTION OF DAMS

Kentucky submits that the Report's discussion of the construction of the dams on the Ohio River between Illinois and Kentucky and whether their effect was to permanently raise the level of the river above its level in 1792 and as a result the present low-water mark on the Illinois side of the river is farther north than it was in 1792 is *premature* as the issue is not before the Court at this time.

Kentucky concedes that the effect of the dams was to raise the level of the water and that some changes may have occurred in the shoreline. However, Kentucky, at this time, does not know what changes occurred in specific instances and what changes may have occurred in the shoreline along the entire length of its boundary with Illinois.

The effect of the dams and resultant relocation of the water is a matter that will have to be factually determined, if need be, at a later date on the basis of the law found to be applicable to the case.

Moreover, under the doctrines of acquiescence and laches, Illinois has acquiesced to whatever changes in the river which may have occurred as a result of the dams by failing to bring any proceedings to claim a specific line either before or immediately after the construction of the dams.

Furthermore, consistent with Kentucky's position that the current low-water mark is the boundary line and that the principles of accretion and avulsion apply to this line, is the rule that the erecting of artificial structures such as dams and locks does not alter the application of the accretion doctrine. *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 50-66 (1874), unless, perhaps, structures are erected for the specific purpose of causing the accretion. *Beaver v. United States*, 350 F.2d 4 (9th Cir. 1965),

*cert. denied*, 383 U.S. 937 (1966) Accord, *United States v. Claridge*, 416 F.2d 933 (9th Cir. 1969), *cert denied*, 397 U.S. 961 (1970); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

In this regard, Kentucky submits that any subsequent changes in the river resulting from the paramount right of the United States Government to improve navigation by erecting dams to maintain a nine foot channel of navigation should be accretive in nature and the boundary should continue to follow the prevailing low-water mark. The effect of inundation of some of the shoreline, if any, is minimal compared to the acknowledged riparian benefit to both sovereigns of improved navigation on this valuable avenue of commerce.

#### IV. CONCLUSION

Kentucky submits that it has proven its affirmative defense of acquiescence by a preponderance of the evidence. Therefore, its motion for summary judgment should be granted.

Respectfully submitted,

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